Office - Supreme Court, U. S.
FILED
MAY 4 1944
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 963

JOHN J. BATTERMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

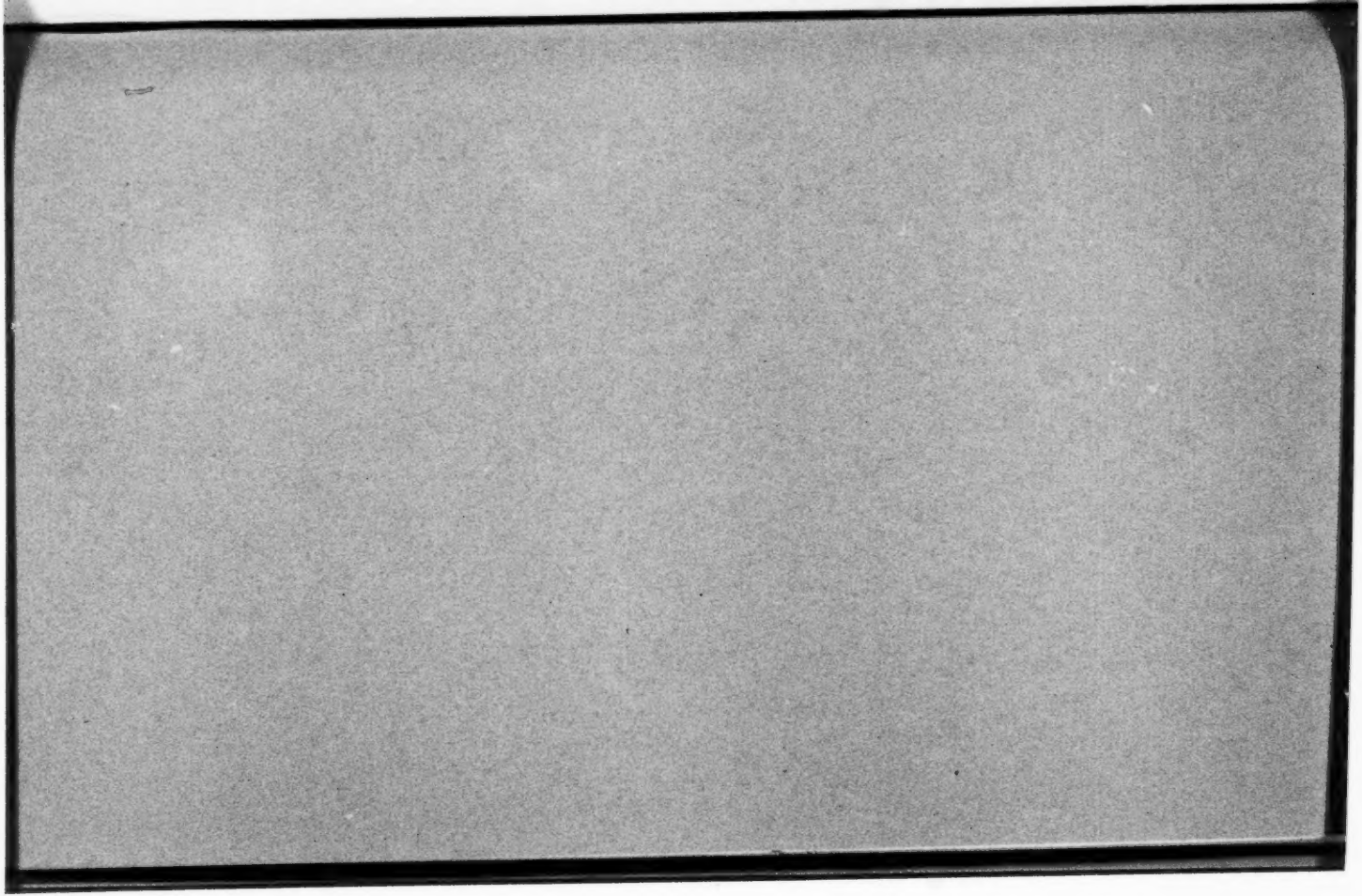
To the United States Circuit Court of Appeals
For the Sixth Circuit, and

BRIEF IN SUPPORT THEREOF.

SYDNEY A. DAVIES,
1180 Union Commerce Bldg.,
Cleveland, Ohio,
Counsel for Petitioner.

CHARLES FAHY,
Solicitor General,
Washington, D. C.,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647



SUBJECT INDEX.

PETITION FOR WRIT OF CERTIORARI

I. Summary Statement of matter involved..... 1

II. Facts 2

III. Questions presented and petitioner's Contentions 9

IV. Reasons relied on for allowance of writ..... 10

V. Prayer for Writ..... 11

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction 13

Statement of the case and of Questions involved.... 14

Specification of errors..... 15

Argument

(1) That the transfer of 9,000 shares from Dr. Dohme to his brother-in-law and sister-in-law, John J. Batterman, petitioner, and his wife, constituted a gift and not taxable income 15

(2) Application of *Helvering, Commissioner v. American Dental Company* case to instant facts 16

(3) Restrictions on sale of stock..... 26

(4) Speculative value of stock..... 27

Relief requested 29

AUTHORITIES CITED.

Cases.

Bogardus v. Commissioner, 302 U. S. 34 (19 A. P. T. R. 1195) 21, 22

Commissioner v. American Dental Company, 44 B. T. A. (F) 425, 428..... 18

Gipsy Oil Company v. Escoe, 275 U. S. 498..... 13

Helvering, Commissioner v. American Dental Company, 87 Sup. Ct. (Law Ed.) 574..11, 15, 18, 19, 20, 23

Propper, et al. v. Commissioner, 89 F. (2nd) 617, reversing 33 B. T. A. 261..... 27

Schuh Trading Company v. Commissioner, 95 F. (2nd) 404 27

State Street Trust Company v. United States of America, 37 F. (Supp.) 846..... 27

Tex-Penn Oil Company v. Commissioner, 300 U. S. 481, 57 S. Ct. 569 (18 A. F. T. R. 1174)..... .....10, 27

United States v. State Street Trust Company, 124 F. (2nd) 948 27

Statutes.

Act of February 13th, 1925, c. 229, Section 8 (a, b, d), 43 Stat. 940, United States Code, Title 28, Section 380 13

Judicial Code:

Section 240(a) (as amended by Act of February 13th 1925, 43 Stat. 938 United States Code, Title 28, Section 347(a))..... 13

Regulations 94, Article 22(a)-3..... 28

Revenue Act of 1936:

c. 690, 49 Stat. 1648, Section 22(a).....9, 14

c. 690, 49 Stat. 1648, Section 22(b) (3).....9, 10, 14, 29

c. 690, 49 Stat. 1648, Section 213(b) (3)..... 15

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. . . . . .

JOHN J. BATTERMAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of John J. Batterman, who also was the petitioner-appellant below, respectfully shows:

I.

(a) SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for writ of certiorari to review a judgment of the Circuit Court of Appeals for the Sixth Circuit which affirmed the judgment of the United States Board of Tax Appeals (now the Tax Court of the United States) on an appeal taken by petitioner to said Board for re-determination of an income tax deficiency asserted by respondent with respect to the income of the petitioner for the year of 1937.

(b) The facts, history of the case and statement of contentions of the parties as to basic question involved.

1. The petitioner is a resident of Cuyahoga County, Ohio, and a citizen of the 18th Taxing District (Ohio). (Stip. R. 15—Finding R. 136)
2. The respondent asserted a deficiency against the petitioner on account of income taxes for the year of 1937. (Exhibit "A"—R. 6—Stip. R. 15)
3. The taxes in controversy represent a deficiency assessed by the commissioner for the year of 1937 amounting to $11,278.29, which after credit on account of matters not in issue herein reduced the amount to $10,810.78. (Stip. R. 15—Finding R. 148)
4. The Gabriel Company was incorporated under the laws of Ohio May 1st, 1925 and has continued existing at all times since and operates a manufacturing plant, manufacturing for sale passenger automobile shock absorbers, and maintains its plant and offices in Cleveland, Ohio. (Stip. R. 15)
5. That some time prior to November, 1931 Dr. Alfred R. L. Dohme, petitioner's brother-in-law, purchased the entire issued and outstanding Class "B" common stock of The Gabriel Company, consisting of 2,000 shares which were the sole and only voting shares issued by The Gabriel Company. (Stip. R. 15—Finding R. 136)
6. Following the purchase of said entire issue of outstanding Class "B" common stock by Dr. Alfred R. L. Dohme, he having the sole voting control of The Gabriel Company, caused The Gabriel Company to enter into a contract of employment with his brother-in-law, John J. Batterman, the petitioner, which contract was dated November 16th, 1931 and provided as compensation to the petitioner for his devoting his entire time and effort to the company, $10,000.00 plus an agreed percentage of net profits. (Exhibit "B" R. 20—Stip. R. 15, 16—Finding R. 136, 137)

7. Shortly prior to the expiration of the original employment contract (Exhibit "B") the petitioner was re-employed under a new five year contract dated November 5th, 1936 between the petitioner and The Gabriel Company by which the petitioner was to receive $12,500.00 for the first year and $15,000.00 each for the remaining four years of the second contract. Both contracts were carried out by both parties, and during said ten year period (1931 to 1941) the petitioner had no other employment, but devoted his entire time, interest and effort to his position with The Gabriel Company. (Exhibit "C" R. 23—Finding R. 136, 137—Stip. R. 16)

8. Said increased compensation was accounted for by reason of Dr. Dohme causing his brother-in-law, John J. Batterman, the petitioner, to be elected to the Presidency and General Managership of The Gabriel Company, which caused him to have full and complete charge of the management and operation of said corporation, The Gabriel Company. (Stip. R. 16—Finding R. 136)

9. The Gabriel Company had sustained operating losses for some years prior to 1936, and in that year was in poor financial condition, and needed additional capital. (Petitioner's testimony R. 85—Finding R. 137)

10. In December of 1936 the shares in question had a book value of $2.61 per share, and the following are the high and low stock market prices of said stock for the respective years set opposite such quotations:

Year	*High*	*Low*
1935	5-3/8	7/8
1936	7-3/8	3-3/4
1937	7-1/2	1-1/8
1938	3-7/9	1-1/4
1939	3-1/4	1-1/2

and the respective losses of said company for the same years are as follows:

Year	*Loss*
1935	$41,976.00
1936	77,368.00
1937	18,359.00
1938	55,101.00
1939	27,732.00

and the number of shares dealt in on the New York Stock Exchange were as follows:

Year	*No. of Shares*
1937	141,420
1938	60,300
1939	53,600

11. That during the week in which the stock was transferred by Dr. Dohme to the petitioner, to-wit: February 23rd, 1937 there were sales of 2800 shares of The Gabriel Company stock reported on the New York Stock Exchange, and on said date of issuance, to-wit: February 23rd, 1937, shares of The Gabriel Company were sold on the New York Stock Exchange at a price of 5⅜ which is the price used by the Commissioner in determining the deficiency assessed which is one of the issues in this action. (Stip. R. 90)

12. That prior to the reorganization hereinafter referred to, The Gabriel Company had issued and outstanding a Class "A" preferred, non-voting stock of 198,000 shares and 2,000 shares of Class "B" common stock which had sole voting control, and all of which was owned by Dr. Alfred R. L. Dohme. The corporation had no other preference stock or funded debt. (Stip. R. 17—Finding R. 137)

13. In January, 1936 a plan of reorganization of the capital structure of The Gabriel Company was discussed with Dr. Dohme by the petitioner and executives of The Gabriel Company, and upon recommendation of the executives, including the petitioner, H. M. Preston & Company, a firm of finan-

cial experts and engineers who had many years' experience in reorganizing corporations, was employed to make a survey of the company's condition, and to make recommendations. (Stip. R. 16—Finding R. 137)

14. The survey resulted in a recommendation that H. M. Preston & Company be permitted to prepare a plan of reorganization of The Gabriel Company capital structure (Finding R. 137); that such recommendation of H. M. Preston & Company to The Gabriel Company provided, among other things for—

(a) An increase and change of the Class "A" non-voting shares from 198,000 to 300,000 voting shares.

(b) That Dr. Dohme surrender for cancellation his 2,000 shares of the Class "B" voting common stock and that this class of stock be withdrawn.

(c) That in consideration thereof Dr. Dohme receive 40,000 shares of the increase in new Class "A" voting stock.

(d) That the remaining shares of the new 300,000 shares is to be sold to the public for the purpose of raising additional capital for the corporation. (Stip. R. 17—Finding R. 137)

15. Following contact between The Gabriel Company and H. M. Preston & Company in December, 1935, in January of 1936, the petitioner and his wife and R. Hosken Damon, attorney for H. M. Preston & Company, discussed the matter with Dr. Dohme in Florida, where it was arranged that Dr. Dohme should receive 40,000 shares of the new Class "A" voting stock in consideration of his surrender and cancellation of his 2,000 shares of Class "B" voting stock, and Dr. Dohme approved the reorganization plan and agreed with H. M. Preston & Company that out of his 40,000 shares he would pay to H. M. Preston & Company in new shares, their fee for engineering and reorganization,

which fee it was agreed should not exceed one-half of the shares being received by Dr. Dohme and would be between 15,000 and 20,000 shares, and Dr. Dohme by such arrangement was to retain 10,000 shares for himself and wished to distribute to his brother-in-law and his wife, and two of his friends, officials of The Gabriel Company, the balance of said shares which ultimately amounted to 12,000 shares. (See Dohme deposition R. 122, 123)

16. In consummation of said reorganization plan approved by Dr. Dohme and the shareholders of The Gabriel Company, Dr. Dohme deposited with The Cleveland Trust Company, Cleveland, Ohio, said 2,000 shares of Class "B" voting common stock under a voting trust agreement designating Preston, Damon and the petitioner, voting trustees, and under power of said voting trust Dr. Dohme's 2,000 shares of voting stock were voted in favor of said reorganization plan. (Stip. R. 17—Finding R. 138)

17. That following adoption of said plan on May 18th, 1936 by The Gabriel Company shareholders, the reorganization proceeded to a conclusion, and on November 29th a certificate for 40,000 shares was issued to the voting trustees, which was exchanged on December 21st, 1936 for a certificate for 30,000 shares and an additional certificate for 10,000 shares, and the latter certificate for 10,000 shares was delivered to Dr. Dohme on December 24th, and at the same time he directed the voting trustees to distribute the 30,000 shares represented by the other certificate in the following manner:

    18,000 shares to H. M. Preston as and for compensation in effecting the transaction, and the balance was to be delivered to the petitioner and his wife, E. L. Beecher, Research Engineer of The Gabriel Company, and L. W. Klein, its Secretary, the petitioner, brother-in-law of Dr. Dohme, and his wife, to receive 9,000 shares and Beecher and Klein each to receive 1500 shares. (Finding R. 139—Stip. R. 18, 19)

18. That subsequently in order to satisfy a disgruntled stockholder, Preston & Company contributed 320 shares, the petitioner 240 shares and Klein and Beecher 40 shares each, which were optioned at $4.00 per share and subsequently sold under said option, which left 18,000 shares for distribution to H. M. Preston & Company, 8760 to the petitioner and 1460 shares each to Klein and Beecher, and actual distribution was made accordingly on February 23rd, 1937, and the petitioner's shares were issued to him and his wife jointly. (Stip. R. 18, 19—Finding R. 139)

19. That the petitioner is the brother-in-law of Dr. Dohme and their relations as well as those between Dr. Dohme and Beecher and Klein were unusually pleasant and friendly. (Finding R. 139—Pet. test. R. 85)

20. That Dr. Dohme, the donor, intended such shares to the petitioner, Beecher and Klein to be gifts, even though Dr. Dohme hoped that it would be an incentive to them to remain with the business and do their utmost for it. (Third answer R. 123—Dr. Dohme deposition—last answer R. 124 Dohme deposition—first answer R. 125 Dohme deposition —last answer R. 126 Dohme deposition—second answer R. 132 Dohme deposition—third answer R. 132 Dohme deposition—first and second answers R. 133 Dohme deposition—Batterman test. R. 77)

21. The petitioner, John J. Batterman, never owed Dr. Dohme any money, nor did Dr. Dohme ever owe petitioner any money, nor did Mrs. Batterman ever owe Dr. Dohme any money, nor did Dr. Dohme owe anything to any of the family. (R. 91 —Finding R. 140)

22. Mrs. Batterman was never employed by either Dr. Dohme or The Gabriel Company, and neither were ever indebted to her or to the petitioner. (R. 91—Finding R. 140)

23. The petitioner had no agreement with The Gabriel Company, or Dr. Dohme, whereby he should re-

ceive any compensation in any form whatsoever based upon the conclusion of the reorganization. (R. 91—Batterman test.)

24. During 1936 the petitioner, Klein, Beecher and H. M. Preston & Company, recipients of the 30,000 shares of Dr. Dohme's 40,000 shares, entered into an oral agreement that in any one year none would sell more than one-fifth of the shares that he would receive, and the petitioner entered into this agreement because he felt that heavy sales would depress the market but he was willing to enter the arrangement in the hope that the interests of all might be maintained. (Finding R. 141—Batterman test. R. 86, 87, 88)

25. That The Gabriel Company had issued an option to Shields & Company, a brokerage firm of New York, to purchase 20,000 shares of the new stock at $4.00 per share and the option was not exercised by Shields & Company although during said period of the option the stock was sold for as high as 6.125 per share. (Exhibit "G," R. 46) (Finding R. 141)

26. That the petitioner in his 1938 income tax return reported the sale of $1334.44 of said shares under Schedule F, as capital gain; that the reporting in said tax return was induced by an Internal Revenue Agent's negotiations over whether said shares should be returned in the 1937 income tax return. (Meaden test. R. 104 to 107, excluding answers stricken from the record by the Tax Court of the United States.)

27. Neither The Gabriel Company nor Dr. Dohme ever made any deductions on their tax returns or from their income on their personal and corporate books, respectively, for any compensation paid to the petitioner, or any other donees.

28. That the donees of said 30,000 shares of stock received from Dr. Dohme agreed between themselves that none of such holders would sell more than 20% of their stock in any one year, and that said 30,000 shares of stock represented approximately

14% of the issued and outstanding stock of The Gabriel Company. The purpose of this parol understanding was to prevent the depressing of the market on said stock which agreement as between Preston & Company and its associates, the petitioner, Beecher and Klein was carried out and fully performed.

29. In December, 1941 respondent mailed to petitioner his notice of determination of the income tax deficiency for the year of 1937 which is in controversy herein, appeal from said determination being thereupon taken by the petitioner to the Board of Tax Appeals. (R. 1)

30. On April 1st, 1943 the Board sustained respondent's determination of petitioner's liability and entered judgment in favor of respondent and against petitioner for the amount of the said deficiency in controversy for the year of 1937, to-wit: $10,810.78. (R. 136)

31. On June 11th, 1943 petitioner filed his petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, together with statement of points involved.

32. On February 25th, 1944 the Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the Board of Tax Appeals without opinion.

(c) Questions Presented.

1. Was the transfer of 9,000 shares of stock of an Ohio corporation from the owner to his brother-in-law and sister-in-law compensation taxable under Section 22(a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, or was it an exclusion from gross income as a gift under 22(b) (3) of the Revenue Act of 1936, c. 690, 49 Stat. 1648?

   Petitioner contends that said 9,000 shares of stock received by him and his wife from Dr. Dohme was a gift and not taxable income.

2. Was the Commissioner warranted in assessing a deficiency against the petitioner on a basis of the

stock market price of free, unrestricted stock, as of the date of transfer, whereas petitioner's stock was subject to an agreement between certain parties holding 14% of all issued stock, that none would dispose of more than 20% of their holdings per annum?

Petitioner contends that by reason of said parol agreement not to dispose of more than 20% of their respective holdings in each year, which agreement was fully performed, that the price was so restricted that if taxable income, it should only be taxed in the years sold.

3. Is the petitioner, because of the highly speculative character of the stock during the year in question, entitled (if said stock is compensation) to return and be subject to tax on that portion of said stock sold in each year, or must the petitioner return as income from compensation said shares at the stock market price on the day of transfer regardless of restrictions and the speculative value of said stock?

Petitioner contends that because of the highly speculative value of the stock that under the doctrine expressed in *Tex-Penn Oil Company v. Commissioner*, 300 U. S. 481, 57 Sup. Ct. 567, the stock should only be taxed, if taxable income, in the years in which the stock was sold, it being incapable with reasonable certainty to know the fair market value as of the date of transfer.

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

In holding and deciding—

1. That the transfer of 9,000 shares of stock by the shareholder of a corporation to his brother-in-law and sister-in-law constituted taxable income, and that such transfer was not a gift exempt therefor under Section 213(b) (3) of the Revenue Act of 1936, c. 690, 49 Stat. 1648.

2. That petitioner was not restricted as of date of transfer in the disposition of more than 20% of such holdings per annum.
3. That the petitioner's stock should be valued at the stock market price as of date of transfer, even though a highly speculative stock.
4. Said Circuit Court of Appeals decided federal questions in a way probably in conflict with applicable decisions of this court. Said decision of the Circuit Court of Appeals is inconsistent with decisions of this Court and other federal courts in analogous cases. Such cases being numerous, will be referred to in petitioner's brief which is annexed hereto.
5. That the conclusions of the Tax Court in arriving at its decision were the result of reasons which existed in the case of *Commissioner v. American Dental Company*, 87 Sup. Ct. (Law Ed.) 574, which the Supreme Court of the United States refused to support as proper reasons for the Tax Court's conclusions.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this Court for its review a full and complete transcript of the record and proceedings in this cause No. 9609 on the docket of said Circuit Court and entitled there as in this petition, to the end that this cause may be reviewed and the rights of the parties determined by this Court according to law, and that your petitioner may have such other and further relief as to this Court may seem proper and in conformity with law and your petitioner will ever pray.

JOHN J. BATTERMAN, *Petitioner,*
by SYDNEY A. DAVIES,
His Counsel.

Dated: May 2, 1944.